SUPREME COURT, U. S.

No. 5760

In the Supreme Court of the United States

OCTOBER TERM, 1970

PAUL PANCZKO, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the court of appeals, one judge dissenting, is not yet reported (Pet. App. A).

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1970. A petition for rehearing *en banc* was

denied on August 4, 1970 (App. B). On August 24, 1970, the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether at petitioner's trial for an attempt to bribe a juror at an earlier trial, that juror's statement, in response to the questioning of the court, that she joined with the other jurors in returning a guilty verdict at the earlier trial constituted reversible error.

2. Whether in the circumstances of this case, petitioner's requests for production of witnesses were dealt with properly by the trial court.

3. Whether the jury chosen to try petitioner was fair and impartial.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on a two-count indictment which charged that, together with co-indictee Margaret Gorman,[1] he had bribed and attempted to influence a petit juror, in violation of 18 U.S.C. 201(b) and 18 U.S.C. 1503. On June 27, 1968, petitioner was sentenced to imprisonment for concurrent terms of fifteen years on the first count, and five years on the second. Both

[1] On June 20, 1968, one week before petitioner was tried, a jury convicted Miss Gorman on both counts.

sentences were made to run consecutively to an earlier sentence then being served (Tr. 439).[2]

The evidence, which is detailed in the opinion below (Pet. App. 5-7), showed that among the jurors chosen to try a criminal case involving a postal offense in which petitioner was the sole defendant was a Mrs. Sue Taylor (Tr. 318-320). On the evening of December 9, 1964, following the first day of that trial, petitioner asked two associates, D'Argento and LaJoy, whether they knew Mrs. Taylor and expressed an interest in finding a female intermediary to intercede with her in his behalf (Tr. 327, 347). After receiving negative replies from both men, petitioner decided to use Margaret Gorman for this purpose. She agreed. Petitioner made arrangement with LaJoy to take Miss Gorman to Mrs. Taylor's home the following day (Tr. 327-329, 347-350).

On December 10, 1964, while petitioner's trial was still in progress (Tr. 341), LaJoy drove Miss Gorman to the vicinity of the Taylor home (Tr. 350). Miss Gorman entered and met Mrs. Taylor. She refused to identify herself, but asked Mrs. Taylor to vote to acquit petitioner and said that she "would be well taken care of" (Pet. App. 6). Mrs. Taylor replied that she had not heard enough evidence to decide. Over

[2] "Tr." refers to the unnumbered transcript of proceedings before the district court. Also on file with the Clerk of this Court are two numbered transcripts, with volume I pertaining to the transcript of preliminary hearings common for both defendants, before the severance was granted as to Miss Gorman. Volume II is the trial transcript pertaining to Miss Gorman. Miss Gorman's appeal to the court of appeals was dismissed for want of prosecution (Pet. App. 2).

Mrs. Taylor's objections, Miss Gorman left a white envelope on a kitchen counter-top (Tr. 337).[3] Mrs. Taylor retained the envelope but did not examine its contents. After she had completed her jury duties, she examined the contents and found that the envelope contained $500 in cash. She retained this money for an additional time before she deposited it in a personal bank account (Tr. 338-339).

In response to a question by the court, Mrs. Taylor testified that she had joined with the other jurors in finding petitioner guilty at the 1964 trial (Tr. 342).

ARGUMENT

1. Petitioner asserts that the trial court's inquiry of Mrs. Taylor as to how she had voted at the earlier trial constituted reversible error since the jury thus impermissibly learned that he had been convicted of a crime and was not told that the conviction had been reversed on appeal. This contention must be assessed in the particular context.

Unlike the cases relied upon by petitioner (see Pet. 19-20), in the very nature of things, on a charge of attempting to bribe a juror, it is inevitable that the jury will be apprised that the defendant had previously been charged with a crime. That the jury in this case was further informed that petitioner had been convicted added very little to what they already properly knew. Indeed, it is not unreasonable to con-

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[3] After this visit, petitioner discussed with D'Argento Miss Gorman's overture to Mrs. Taylor and the possibility of a mistrial (Tr. 329-330).

clude that the fact that the juror who had voted to convict had nevertheless retained the funds given her for a considerable length of time thereafter may have had more of an impact on the jury in weakening her credibility as a witness than in suggesting petitioner's guilt.[4] In any event as the majority below concluded, Mrs. Taylor was corroborated in material respects by petitioner's own former associates, LaJoy and D'Argento. On this record, the single question and answer regarding petitioner's conviction may fairly be termed harmless beyond a reasonable doubt. See *Harrington* v. *California*, 395 U.S. 250; *Chapman* v. *California*, 386 U.S. 18.[5]

2. Before trial, petitioner[6] asked for blank sub-

[4] Petitioner further asserts that government counsel compounded the prejudice by referring to the conviction in his closing argument. The prosecutor argued that Mrs. Taylor had not opened the envelope until she had voted for conviction in the earlier case (Tr. 393), in an attempt to bolster Mrs. Taylor's credibility. The majority below also surmised that the trial court's inquiry of Mrs. Taylor was also prompted by the credibility question, emphasizing that "the government did not offer the evidence, and the court's question was not designed, to prove Panczko's guilt." (Pet. App. 7-8).

[5] There is accordingly no reason to grant the writ to determine whether the reasonable doubt requirement of *Harrington* and *Chapman* is applicable to a case such as this (See Pet. 20). Nor is there a reason to resolve the dispute between the dissent and the majority opinion as to the nature of the harmless error doctrine enunciated in *Kotteakos* v. *United States*, 328 U.S. 750 (Compare Pet. App. 5, note 6, with Pet. App. 11-12).

[6] At petitioner's insistence, he represented himself. The court, however, appointed an attorney to assist petitioner to the extent that petitioner desired (Tr. 20, 34, 40, 88). At trial, petitioner refused to cross-examine any witness or to present any evidence.

poenas for 67 witnesses to be called at government expense (Tr. 75, 80, 99, 101). The trial court explained to petitioner that while he did not have "to expose" his evidence, he had to furnish the names and addresses of the witnesses desired and to aver that they had some knowledge of the facts in order to justify their being summoned to testify (Tr. 78-80, 100, 146-147). At first, petitioner declined to furnish the list of names (Tr. 99, 101); later, however, he submitted a list for a lesser number which included a group of 11 prisoner-inmates whose testimony was desired in order to impeach the trial testimony of convicts LaJoy and D'Argento (Pet. 11-12, Tr. 172-175, 215). It was ascertained through counsel assigned to assist petitioner that some of the prospective convict witnesses would give evidence that would be merely cumulative (Tr. 224). The court then offered to subpoena the two or three witnesses that petitioner felt would be the strongest. Petitioner declined to make any selection (Tr. 225-229) and the court declined to order the production of all eleven (Tr. 226).

As the court of appeals held (Pet. App. 10), the interrogation of petitioner in the presence of the prosecutor as to petitioner's need for the production of a large number of witnesses was not error. The need for an *in camera* consideration arises where explanation of the need for a witness will disclose defense strategy. No effort was made to force disclosure of any defense theory. What was requested was general information so that the court could intelligently exercise its discretion. Petitioner was repeatedly told he did not have to disclose his evidence.

The trial court's offer, based on petitioner's representations that witnesses were necessary for impeachment, to subpoena two or three of the convict witnesses was entirely adequate, and the court was not required to subpoena all eleven. Whether a defendant is an indigent or not, a court may limit the number of witnesses when the effect of evidence to be given by additional witnesses would be cumulative. See *Michelson* v. *United States*, 335 U.S. 469; *Loux* v. *United States*, 389 F.2d 911, 917 (C.A. 9), certiorari denied, 393 U.S. 867.[7]

3. Petitioner contends that the jury that convicted him possessed prejudicial information because another jury, drawn from the same venire, had, one week earlier, returned a guilty verdict as to his co-indictee, Miss Gorman (Pet. 21-22). The trial court was aware of the problem and excluded from the group of jurors who were to be examined on *voir dire* at petitioner's trial the fourteen who had heard the evidence in the Gorman trial (Tr. 198, 250, 385). None of the remaining jurors (including those later excused from serving at petitioner's trial) indicated that they knew the result of the Gorman trial (see Tr. 266-267, 280, 286, 301-302, 303). No factual support therefore exists for the assertion that the present panel was tainted by awareness of the Gorman conviction.[8] In

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[7] Moreover, there were non-convict witnesses who petitioner claimed could impeach LaJoy and D'Argento. Even though these witnesses were available, petitioner did not call on any to testify (Tr. 193-197, 223, 226, 228, 239, 357-359, 361, 373).

[8] None of the transcript references cited by petitioner (Pet. 4-5) show knowledge of the Gorman conviction on the part of any juror who served at petitioner's trial.

these circumstances, there was no impropriety in drawing petitioner's jury from the same venire which had furnished the jurors for the trial of another defendant charged with the same offenses. Compare *United States* v. *Haynes*, 398 F.2d 980, 983-986 (C.A. 2), certiorari denied, 393 U.S. 1120.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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